In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-959

JOHN H. YOUNG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of California, petitioner was convicted on four counts involving the smuggling of heroin and cocaine, and conspiracy, in violation of 21 U.S.C. 841(a)(1), 846, 952, 960, 963. He was sentenced to four concurrent terms of eight years' imprisonment (C. Tr. 166-168).[1] The court of appeals affirmed *per curiam* (Pet. App.).

Petitioner contends that he was denied assistance of counsel, alleging that the ~~relevation~~ revelation at trial that his codefendant would testify against him surprised

[1] "C. Tr." refers to the clerk's transcript; R. Tr. refers to the reporter's transcript.

his counsel, who was then unable to prepare adequately without a continuance. Petitioner, however, made no motion for a continuance during his trial and apparently confuses his pre-trial motions for continuance and for disclosure of the government's witnesses with the events that occurred at trial. A motion made the afternoon before trial by petitioner to substitute retained counsel for his appointed counsel was denied (C. Tr. 210–211). The court of appeals ruled, and petitioner now concedes (Pet. 19), that denial of this motion was not an abuse of the trial court's discretion.[2] A pre-trial motion for a list of the government's witnesses was also denied (C. Tr. 210–211); and this ruling was properly affirmed by the court of appeals on the ground that the government is not required to disclose the names of its witnesses. See *United States* v. *Glass*, 421 F. 2d 832 (C.A. 9); *Rosenzweig* v. *United States*, 412 F. 2d 844 (C.A. 9); 18 U.S.C. 3432; Rule 16, Fed.R.Crim.P.[3]

Once it became known at trial that petitioner's co-defendant would testify against him, a continuance

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[2] Even petitioner's retained counsel noted to the trial court at the time of the motion that such "eleventh hour" motions for continuance are "untimely" (R. T. 204–205).

[3] Petitioner relies on *Williams* v. *Florida*, 399 U.S. 78, for the argument (Pet. 15–16) that failure by the government to disclose its witnesses to him constituted reversible error. But *Williams* has no application here. That case involved the Florida rule requiring a defendant who intends to rely on an alibi to disclose to the prosecution before trial the names of his alibi witnesses and requiring the prosecution then to disclose the names of witnesses it intends to use to rebut his alibi. No similar rule for mutual discovery was involved in this case.

might have been proper to allow petitioner's counsel to deal with this development; nonetheless the fact is that petitioner made no request for such a continuance. And petitioner has not shown that the failure to grant him a continuance *sua sponte* was actually prejudicial.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1973.

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